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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

PAUL DAVID GALLEGOS II,

Defendant and Appellant.

F069355

(Super. Ct. Nos. MCR043416 &
MCR043662)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Madera County. Mitchell C. Rigby, Judge.

Francine R. Tone, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Julie A. Hokans and Henry J. Valle, Deputy Attorneys General, for Plaintiff and Respondent.

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* Before Kane, Acting P.J., Franson, J. and Peña, J.

On May 18, 2012, defendant Paul David Gallegos II was convicted by guilty plea of felony possession of a controlled substance (Health & Saf. Code, § 11350, subd. (a)) in case No. MCR043416 for a crime he committed in 2011. The trial court deferred entry of judgment pending defendant's successful completion of a program, which he ultimately failed to complete. On September 18, 2012, defendant was convicted by guilty plea of burglary (Pen. Code, § 459)¹ in case No. MCR043662. On May 2, 2014, the trial court sentenced him to four years for the burglary conviction and eight months (one-third the middle term) for the possession of a controlled substance conviction. Defendant filed a notice of appeal on May 7, 2014.

On appeal, defendant's sole contention is that section 1170.18 applies to him retroactively and therefore we should reduce his felony conviction for possession of a controlled substance to a misdemeanor.

The People respond that defendant may not seek this remedy here, but must instead file a petition with the trial court. We agree and dismiss the appeal.

DISCUSSION

While defendant's appeal was pending, on November 4, 2014, voters enacted Proposition 47, the Safe Neighborhoods and Schools Act (hereafter Proposition 47), and it went into effect the next day. (*People v. Rivera* (2015) 233 Cal.App.4th 1085, 1089.) "Proposition 47 makes certain drug- and theft-related offenses misdemeanors, unless the offenses were committed by certain ineligible defendants. These offenses had previously been designated as either felonies or wobblers (crimes that can be punished as either felonies or misdemeanors)." (*Id.* at p. 1091.) Among the enumerated offenses set forth in Proposition 47 is possession of a controlled substance. (See Health & Saf. Code, § 11350, subd. (a).)

¹ All statutory references are to the Penal Code unless otherwise noted.

“Proposition 47 also created a new resentencing provision: section 1170.18. Under section 1170.18, a person ‘currently serving’ a felony sentence for an offense that is now a misdemeanor under Proposition 47, may petition for a recall of that sentence and request resentencing in accordance with the statutes that were added or amended by Proposition 47. (§ 1170.18, subd. (a).) A person who satisfies the criteria in section 1170.18 shall have his or her sentence recalled and be ‘resentenced to a misdemeanor ... unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety.’ (§ 1170.18, subd. (b).) Subdivision (c) of section 1170.18 defines the term ‘unreasonable risk of danger to public safety,’ and subdivision (b) of the statute lists factors the court must consider in determining ‘whether a new sentence would result in an unreasonable risk of danger to public safety.’ (§ 1170.18, subds. (b), (c).)” (*People v. Rivera, supra*, 233 Cal.App.4th at p. 1092.)

Here, defendant did not petition the trial court for recall of his sentence. The plain language of section 1170.18, however, requires a defendant to first file “a petition to recall (if currently serving the sentence) or an application to redesignate (if the sentence is completed) in the superior court of conviction.” (*People v. Diaz* (2015) 238 Cal.App.4th 1323, 1331-1332 (*Diaz*).)²

We conclude defendant must petition the trial court, utilizing the procedures specified in section 1170.18. Furthermore, any arguments on appeal that Proposition 47

² *Diaz* also concluded “the voters did not intend to permit an appellate court to declare in the first instance that a felony conviction for a crime reduced by Proposition 47 is a misdemeanor.” (*Diaz, supra*, 238 Cal.App.4th at p. 1332.) Other recent decisions have rejected arguments on appeal that appellate courts are required to reduce offenses predating Proposition 47 when the judgments are not yet final, and the decisions instead require defendants to utilize the procedures specified in section 1170.18. (See *People v. Contreras* (2015) 237 Cal.App.4th 868, 873, 889-892; *People v. Awad* (2015) 238 Cal.App.4th 215, 221-222 [finding the task of reducing a conviction from a felony to a misdemeanor under Proposition 47 “manifestly” vested with the trial court].)

should be applied retroactively are premature.³ As a result, defendant raises no cognizable issues on appeal.

DISPOSITION

The appeal is dismissed without prejudice to defendant's filing a petition in the trial court to recall his sentence.

³ We note that the issue of whether Proposition 47 applies retroactively to a defendant who was sentenced before its effective date but whose judgment was not final until after that date is pending before our Supreme Court in *People v. Dehoyos*, review granted September 30, 2015, S228230.